IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 3 OF 1996

1. Shri Govind Sazro Salgaonkar.

2. Miss Milan Sazro Salgaonkar,
both major of age,
residents of Sauntavaddo,
Calangute, Bardez, Goa. ... Appellants/
Orig.Plaintiffs.

VERSUS

Shri Laxman Sazro Salgaonkar,
major of age,
resident of Sauntavaddo,
Calangute, Bardez, Goa. ... Respondent/
Orig.Defendant.

Shri V. Menezes, Advocate for the Appellants.

Shri N. Sardessai, Advocate for the Respondent.

CORAM: **N. A. BRITTO, J.**

DATE OF RESERVING THE JUDGMENT: 18.03.2004
DATE OF PRONOUNCING THE JUDGMENT: 25.03.2004

J U D G M E N T:

The appellants are the plaintiffs in Special Civil Suit No.97/93/A and have filed the present appeal against the Decree dated 21.10.94 and Order dated 21.7.95 of the learned Civil Judge Senior Division at Mapusa.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The plaintiffs and the defendant are the children of the late Sazro Hiru Salgaonkar who died on 17.10.71 and Smt. Kalavati S. Salgaonkar who died on 5.2.92.

4. The case of the plaintiffs was that their parents had several landed properties including a country liquor Bar (taverna) built by their father in the year 1945 or thereabout in the property surveyed under No.249 which property was subsequently purchased by their parents in the name of plaintiff No.2 Dilip and that since their mother had started the restaurant business in the said country liquor bar/taverna the name of the said taverna was changed to "Laxman Bar and Restaurant" from 19.2.1987. The plaintiffs also stated that their father had also acquired a liquor store bearing House No.E/7/154-A and the said store was entirely used for storing country liquor and other materials which was subsequently forcibly converted into residence of the defendant regarding which the plaintiffs have filed a suit and the same is pending. The plaintiffs pleaded that their mother took over the business of the said Bar and Restaurant until two years prior to her death on 5.2.92 and the licence for the said Bar and Restaurant stood in her name. The plaintiffs further pleaded that their mother, the said Smt. Kalavati prior to her death on

or about 10.1.92 made a Will whereby she bequeathed her disposable share of properties including the said Taverna Bar and Restaurant and the liquor store to the plaintiff no.1 Govind and that in the year 1972 the plaintiff no.1 had taken electrical installation to the said Bar and Restaurant with his own money and in his name. The plaintiffs also pleaded that after their mother fell sick, the plaintiffs and the defendants managed the ancestral business of the said Bar and Restaurant and prior to that the plaintiffs and the defendant used to help their mother in running the same, but subsequently the defendant requested the plaintiffs to permit him to carry on the said business on certain terms and conditions and the plaintiffs accepted the proposal of the defendant and accordingly executed an Agreement dated 4.11.1992 to run the business of the said Bar and Restaurant from 1.11.1992 to 31.5.1993. It was further the case of the plaintiffs that the defendant agreed to pay Rs.5,500/- per month by way of compensation for running the said Bar and Restaurant and the defendant also orally agreed to pay to the plaintiff No.2 Rs.800/- for the assistance to be rendered to the defendant in the conduct of the said Bar and Restaurant and the defendant paid a sum of Rs.4500/- per month from November, 1992 to February, 1993, but thereafter did not pay any amount. The plaintiffs

stated that the defendant also failed to deposit Rs.1,000/- every month in the Bank in the joint account of plaintiff no.1 and defendant as per clause 2 of the Agreement dated 4.11.1992 and also failed to pay the compensation to the plaintiff no.2 as agreed by the defendant under the said Agreement and thus the said agreement came to an end automatically as provided in the said Agreement. The case of the plaintiffs further was that the plaintiff repeatedly requested and demanded from the defendant to pay to the plaintiffs the arrears of compensation in respect of the said Bar and Restaurant, but inspite of the said demand the defendant did not pay the compensation and denied his liability and therefore the plaintiff sent an Advocate's Notice dated 24.6.93 revoking and cancelling the licence granted to the defendant and called upon the defendant to quit, vacate and hand over the peaceful possession of the said Bar and Restaurant to the plaintiffs within seven days of the receipt of the said Notice by the defendant to pay the arrears of compensation to the plaintiffs and though the defendant received the said notice the defendant did not give possession of the said Bar and Restaurant nor paid the arrears of compensation. The plaintiffs therefore filed the said Civil Suit against the defendant for his eviction, for recovery of compensation and other reliefs.

5. The defendant contested the suit and pleaded that the said Bar and Restaurant did not have any name till 1971, but after the death of their father and taking into consideration that the defendant was managing the said Bar and Restaurant, their mother allowed the defendant to name the said Bar as "Laximan Bar and Restaurant". The case of the defendant was that their mother only provided some assistance to the defendant. The defendant denied that their father had acquired the said liquor store and that the said house has been in continuous possession of the defendant for the last 15 years. The defendant stated that the said Laximan Bar and Restaurant has been in continuous possession of the defendant for about 21 years without any interference from anybody and that their mother had never taken over the business of the said Bar. The defendant stated that he came to know about the said Will for the first time when the defendant received the Notice of R.C.S. No.60/93/C. The defendant pleaded that their mother was in a semi conscious state for about a year prior to her death as she was suffering from chronic sickness and was operated in Bombay. The defendant pleaded that when the said Will was executed their mother was not in a position to understand anything and the plaintiff no.1 Govind managed to get the said Will executed in his favour by using undue influence and coercion. The

defendant stated that the electrical connection was initially standing in the name of their father, but admitted that it was in the name of plaintiff No.1 who misrepresenting facts managed to transfer the same in his name. The defendant stated that the plaintiff no.1 is working at Vasco and never managed the Bar and Restaurant. The defendant denied the signing of the Agreement but stated that the plaintiff No.1 obtained the signature of the defendant on a stamp paper stating that he wanted the signature of the defendant and other co-owners for filing Inventory proceedings in the Court after the death of their mother and the defendant signed the said stamp paper in good faith without reading the contents of the said Agreement. The defendant also filed a counter claim praying therein for dismissal of the suit and for declaring the Will dated 10.1.92 and the Agreement dated 4.11.92 as null and void and for other reliefs.

6. The suit and the counter claim were presumably fixed at the stage of production and inspection of documents on 27.10.94 but on 21.10.94 both the parties appeared before the Court and filed consent terms which read as under "-

> " 1. The Plaintiffs and the Defendant admit, acknowledge and accept that the name of their mother and mother-in-law since deceased Kalavati Sazro

Salgaonkar has been wrongly entered as tenant in the survey records in respect of the paddy fields, surveyed under No.277, sub-division Nos. 14, 24, 34, 48, survey No.278, sub-division Nos.9, 25, 10, 20, 15, 18 & 52, survey No.279, sub-division Nos.45 and 46, situated at Sauntavaddo, of Calangute Village, and they have no right, title or interest to the same.

2. The Defendant shall delete the counter claim put forth by him only in respect of the said paddy fields int he present suit as well as in the application for temporary injunction.

3. The Plaintiffs and the Defendant alongwith their respective spouses on signing of the present compromise/consent terms shall not raise any claim, dispute right regarding the aforesaid paddy fields against the owners of at any point of time in future.

4. The Plaintiffs and the Defendant submits that the present claim in the suit, counter claim and the written statement to the counter claim and the application for temporary injunction filed by the parties in respect of the said paddy fields stands settled, solved and decided amicably between the parties as aforesaid.

5. The Plaintiffs and the Defendant shall bear their own costs.

6. The Plaintiffs and the Defendants pray that a consent decree be passed by the Hon'ble Court in the terms of the above compromise terms arrived at by the parties. "

The learned Trial Court passed an Order therein which reads as follows "-

> " The terms of compromise are accepted. The decree shall be drawn as per terms of compromise ".

7. On the next given date i.e. on 27.10.94 the plaintiffs appeared before the Court through their Advocate and the roznama shows that neither the defendant nor his Advocate had remained present on that day. The plaintiffs filed an application stating that on 21.10.94 the plaintiffs and the defendant had filed consent terms concerning the paddy fields only and that the Trial Court was pleased to pass necessary order on the said consent terms and decreed the suit in terms of the said consent terms. The plaintiffs further stated that the parties had not settled all the disputes concerned the above suit and the main suit as well as the application for temporary injunction filed by the plaintiffs would survive. Notice of this application was ordered to be given to the defendant and the case was fixed on 17.11.94. The plaintiffs filed another application on 19.11.94 which came to be registered as C.M.A. No.348/94 and which has come to be dismissed by Order dated 21.7.1995.

8. Although the learned Civil Judge S.D. ordered that the terms of compromise filed by the parties be accepted and decree be drawn as per the terms of compromise, the decree which came to be drawn shows that the said decree was drawn by way of final disposal of the suit in accordance with the compromise terms.

9. In the above background, learned Advocate Shri Menezes on behalf of the plaintiff has submitted that the subject matter of the suit was not the paddy fields regarding which the settlement was arrived at between the parties and that the intention of both the parties was not at all to settle the Civil Suit filed by the plaintiffs and it is for this reason that the defendants initially did not oppose the said application dated 19.11.1994. Learned Advocate Shri Menezes has further submitted that there were other properties mentioned in the Will particularly Survey Nos.315/2 and 315/11.

10. On the other hand, learned Advocate Shri Sardessai has submitted that the entire suit and counter claim was settled between the parties and in case the said terms did not settle the entire suit or the counter claim, evidence will have to be led to prove the same which cannot be done before this Court.

11. Learned Advocate Shri Sardessai has next submitted that the plaintiffs have filed an appeal against the consent decree which is not maintainable under Section 96(3) C.P.C. Shri Sardessai has submitted that reading the consent terms as a whole is sufficient to conclude that the plaintiffs have given up their right to the Bar and Restaurant which is in possession of the defendant since there is a reference to the suit in the said consent terms. Shri Sardessai has submitted that subsequently the defendant opposed the application of the plaintiffs dated 19.11.94. Shri Sardessai has placed reliance on the cases of **Katikara Chintamani Dora and others v. Guntreddi Annamanaidu and others** [(1974) 1 SCC, 567] and **Jayalakshmi Coelho v. Oswald Joseph Coelho** [(2001) 4 S.C.C., 181].

Order 23, Rule 3 C.P.C. deals with compromise of suit and provides that:

> " Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or

> satisfaction to be recorded, and shall pass a decree in accordance therewith[so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:
>
> [Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded thinks fit to grant such adjournment.]
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> [Explanation.- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]"

12. Section 96 C.P.C. deals with appeal from original decree and sub-section (3) of Section 96 provides that no appeal shall lie from a decree passed by the Court with the consent of parties.

13. In the case of **Katikara Chintamani Dora and others** (supra) it is observed that in any suit, the parties in order to avoid unnecessary expense and botheration, can legitimately make an agreement to

abide by a determination on the same point in issue in another pending action in an advanced state. Considering the agreement in the said case, the Hon'ble Supreme Court observed that there was nothing unlawful and improper in such an arrangement particularly when the interests of the respondents were sufficiently safeguarded by the State which was hotly controverting the decree of the trial court regarding Kadakalla being an estate and that by no stretch of reasoning it could be said that the said agreement was collusive or was an attempt to contract out of the statute. In my opinion, the said observations do not come to the aid of the case of the defendant.

14. In the case of **Jayalakshmi Coelho** (supra) the Hon'ble Supreme Court with reference to Section 152 C.P.C. observed that the power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought the court may find that it may have committed a mistake in

passing an order in certain terms but every such mistake does not permit its rectification in exercise of the court's inherent powers as contained under Section 152 C.P.C. It is to be confined to something initially intended but left out or added against such intention.

15. In my opinion, the learned Civil Judge S.D. was wrong in observing that the subject matter which was not before the Court could not be compromised because Rule 2 of Order 23 itself provides for such a compromise. I am entirely in agreement with the submission of the learned Advocate Shri Menezes that the challenge in this appeal is not to the consent decree as such, but to that portion of the decree which goes beyond the consent terms agreed upon and signed by the parties. I am also inclined to accept the submission of learned Advocate Shri Menezes that the Court has gone beyond the consent terms while drawing up the decree in terms of its own order dated 21.10.1994 by which the terms of the compromise were accepted by the court and decree was ordered to be drawn as per the terms of the compromise. This is not a case where a second thought is required to interpret the terms of compromise. A bare reading of the said terms filed by the parties shows that the said compromise arrived at between the parties was in

respect of the paddy fields only and this was made abundantly clear by both the parties by stating that; "The defendant shall delete the counter claim put forth by him only in respect of the said paddy fields in the present suit as well as in the application for temporary injunction." Admittedly there was no paddy fields in the suit, but what was the subject matter of the suit was the said Bar and Restaurant. The same position was made clear by both the parties by stating that the plaintiffs and the defendant submit that the present claim in the suit counter claim and the written statement to the counter claim and the application for temporary injunction filed by the parties in respect of the said paddy fields stand settled, solved and decided amicably between the parties as aforesaid. Needless to observe the consent terms read as a whole without any effort at interpretation shows that the compromise was arrived at between the parties only in respect of the paddy fields which were enumerated in para 1 of the terms of compromise and not in respect of the Bar and Restaurant which was subject matter of the suit or other properties which were subject matter of the Will and counter claim. It is this compromise which the court had ordered to accept. However, it is seen that when the decree came to be drawn the same was not drawn either in terms of the compromise filed by the

parties or in terms of the order of the court thereon, but decree was drawn as if the suit and the counter claim had come to an end. In my opinion the bar of section 96(3) CPC will not come in the way of the plaintiffs because what is being challenged in this appeal is a decree which is not in accordance with the terms of compromise and the order of the court made thereon and therefore such a Decree would be liable to be set aside.

16. In view of the above, the appeal is bound to succeed and hence I make the following order :-

The appeal is hereby allowed and the so called consent decree dated 21.10.94 is set aside and the learned Civil Judge Senior Division is hereby directed to draw a separate consent decree in terms of the compromise filed by the parties and in accordance with the order made by the Court on the said terms of compromise. Needless to observe the suit and the counter claim shall proceed in respect of other matters which were not the subject matter of the said consent terms filed by the parties.

N. A. BRITTO, J.

sl.